The Time Option Rule Must Be Retained Without Changes

The Notice proposes to modify the Time Option Rule to permit networks to option time so long as appropriate notice is given. This modification would reduce the prohibition to a mockery, representing yet a further opportunity for networks to intrude on licensees' independence in operating their stations.

As the Notice recognizes, the Time Option Rule was intended to facilitate the development of new networks and to preserve licensees' programming discretion. The Notice, however, suggests that the rule may benefit new networks by enabling them to develop a network program schedule. That suggestion, however, overlooks the fact that if existing networks exploit time optioning, a new network will not have any time available to option. The Time Option Rule in its present form is useful for new networks. To add a notice provision would destroy this function.

More significant than its role in fostering new networks is the Time Option Rule's role in preserving licensee discretion. It was this role which the Chain Broadcasting Report stressed:

> A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.
>
> We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions.

Chain Broadcasting Report at 65.

Adding a notice provision to the Time Option Rule would not change time optioning's restriction on licensee programming discretion: it would simply alter the time period over which that restriction is imposed. The Time Option Rule must be retained in its present form.[39/]

The Exclusive Affiliation Rule Should be Retained

The Notice proposes to eliminate Section 73.658(a)'s prohibition on exclusive network affiliation, at least in larger markets. Such action would merely add to the networks' increasing leverage over their affiliates.[40/]

Networks are currently requiring stations to enter into affiliation agreements having terms far in excess of five year license terms.[41/] If these long term contracts are permitted

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39/ As discussed above, existing network provisions already approach (if they do not actually involve) time optioning in that networks are reserving rights to program future time periods and are restricting affiliates in their ability to continue commitments for non-network programs broadcast in time periods which the network wishes to use.

40/ Amazingly, the Notice suggests that affiliates can use the Right to Reject Rule in combination with exclusive affiliation to build an audience for programming it finds more profitable, at the network's expense. Not only is there no evidence of this extraordinary phenomenon, the Commission's concern is patently inconsistent with its longstanding position that its function is not to establish stations' (and presumably also networks') success. See, e.g., Triangle Publications, Inc., 29 FCC 315 (1960), aff'd sub nom., Triangle Publications, Inc. v. FCC, 291 F.2d 342 (D.C. Cir. 1962); PZ Entertainment Partnership, L.P., 68 RR 2d 1446 (1991), recons. denied, 70 RR 2d 1504 (1992).

to be exclusive, the networks' existing dominance over their affiliates will become even stronger.[42] The prohibition on exclusive affiliation should be retained.

The Dual Network Rule Should be Retained

The Commission proposes to eliminate the dual network rule. Such action would enable networks to substantially expand their operations on a nationwide basis, thereby proportionately enhancing their power and influence. Permitting merger of existing networks -- rather than their mere expansion -- would have a devastating impact not only upon nationwide competition but also on competition within local markets. The Commission currently prohibits common ownership of two television stations whose Grade B contours overlap. 47 C.F.R. § 73.3555(b). It should not, and cannot logically, permit two stations in the same market to affiliate with commonly-owned networks which provide a substantial portion of each station's programming.

When combined with the possible increase in station ownership limits and existing and proposed changes in other network rules, elimination of the dual network rule would pave the way for extensive expansion of the existing major networks. It would also erect potentially insurmountable barriers to new networks' entry. The present rule must stay in place.

The Network Territorial Exclusivity Rule
Should be Revised to Reflect Market Realities

The Network Territorial Exclusivity Rule extends affiliates exclusivity rights only within their communities of license. The Notice proposes to eliminate the first prong of the rule

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42/ The provision in ABC contracts seeking to prohibit affiliates from entering into LMA's without the network's consent seeks a form of exclusive affiliation in that ABC would prohibit its affiliate from obtaining programming from another station, if not another network.

(which relates to network programs not taken by the local affiliate) and to modify its second prong (which relates to all network programs) by expanding the geographic area to which it relates. Blade supports these changes.

The law has long recognized the validity of reasonable restrictions designed to preserve the value of purchased property within the purchaser's market area, such as territorial exclusivity provisions in television stations' program contracts. Indeed, the Commission itself has "recognize[d] the legitimate interest of a station purchasing a program to a degree of exclusivity,"[43/] and has adopted rules which protect that interest. 47 C.F.R. Sec. 73.658(m).

The current restriction on network exclusivity -- with a geographic scope limited to a station's community of license -- is an unreasonable regulation. The rule as presently written would not, for example, prohibit Fox from affiliating with a station in Boise, Idaho, even though that market is clearly one served by KTRV, licensed to Nampa. The Commission's other exclusivity rules at least recognize a 35-mile zone, if not the entire DMA, as a reasonable geographic restriction.[44/] The Network Territorial Exclusivity Rule should at a minimum be conformed to this limit.

43/ Notice of Proposed Rulemaking (Territorial Exclusivity Agreement in Non-network Program Arrangements), Docket No. 18179, 33 Fed. Reg. 7158, 7159 (May 15, 1968).

44/ The Commission is currently considering modifications in that rule. See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Further Notice of Proposed Rule Making, Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988).

Conclusion

Today's national television networks recognize that a network affiliation is a valuable asset for a station. Like the radio networks in the early 1940's, they exploit their advantage through the use of affiliation agreements which require stations to cede excessive control over programming and operations to the networks. The Commission long ago found such contractual provisions to offend the public interest.

Changes in the telecommunications marketplace have not rendered such provisions more acceptable in public interest terms. The public interest is still disserved when networks use affiliation as a means of controlling affiliates' decisions which affect the programming, scheduling and operations of their stations. The network contract provisions discussed herein -- and which are being imposed notwithstanding the Four Network Rules' restrictions -- do precisely that. If the Commission were to further relax those rules as proposed in the Notice, affiliates' freedom of operation would be even more restricted: local stations would in practice be forced to cede virtually all control over programming and scheduling to the networks. Local broadcasting would become a thing of the past. If the Commission is to remain faithful to the statutory mandate that licensees, not outside parties, control stations' programming and operations, it must retain the Four Network Rules in their present form.

Respectfully submitted,

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